Supreme Court, U.S.
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No. 93-722

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DETREX CORPORATION,
Petitioner,

v.

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the definition of a "facility" in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(9), encompasses the tanker trucks that Petitioner Detrex Corporation ("Detrex") used to make deliveries of trichlorethylene ("TCE"), a hazardous substance under CERCLA, to Respondent Elkhart Products Corporations' plant where (1) a "motor vehicle" is expressly included in CERCLA's definition of a facility, (2) TCE was spilled from Detrex's tanker trucks during TCE deliveries, and (3) neither the tanker truck itself, nor the TCE spilled from it, constitute consumer products in consumer use.

II. Whether in this CERCLA private cost recovery action brought solely under 42 U.S.C. § 9607(a), where Petitioner Detrex never pled a right to contribution under CERLCA, 42 U.S.C. § 9613(f)(1), but instead brought a separate contribution action effectively rendering the issue moot, the Seventh Circuit Court of Appeals correctly held that Detrex is not entitled to an equitable apportionment of damages under CERCLA's statutory scheme in this action, but that Detrex may pursue its contribution claim in the separate action.

PARENT AND SUBSIDIARY COMPANIES OF THE RESPONDENTS

Respondent Elkhart Products Corporation ("Elkhart Products"), an Indiana corporation, is a wholly-owned subsidiary of Respondent Amcast Industrial Corporation ("Amcast"), an Ohio corporation. The stock of Amcast is traded on the New York Stock Exchange. Elkhart Products has no subsidiary companies. Amcast has no non-wholly owned subsidiary companies.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In July 1983, Amcast acquired Elkhart Products, a manufacturer of copper pipes and fittings, located in Elkhart, Indiana. Record ("R.") 11, 38.[1] In the fall of 1984, Elkhart Products learned that a neighboring landowner, Miles Laboratories, Inc. ("Miles"), had detected TCE contamination in groundwater beneath its property. *Id.* at 102.[2] Miles' environmental consultants implicated Elkhart Products as a possible source of the TCE groundwater pollution. *Id.*

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[1] Respondents' record cites refer to Appellees' Supplemental Appendix filed with the Seventh Circuit on October 2, 1992.

[2] It is undisputed that TCE is a listed hazardous substance under CERCLA. 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4 (1992).

Elkhart Products immediately began investigating whether activities on its property had caused TCE contamination. *Id.* at 102-03. Elkhart Products also hired environmental consultants to investigate whether its own property had TCE contamination. *Id.* The consultants concluded, in a report completed in March 1986, that TCE contamination existed in the soil and groundwater beneath Elkhart Products' property. *Id.* at 103. Elkhart Products and its consultants, in cooperation with state and local officials, began evaluating various methods to clean up the TCE contamination. *Id.* at 103-04. Ultimately, Amcast and Elkhart Products voluntarily installed a groundwater treatment system and a soil vapor extraction system, at a cost of over $1.1 million, to clean up the TCE contamination on Elkhart Products' property. *Id.* at 103-04, 576.

The voluntary and proactive steps taken by Amcast and Elkhart Products to clean up and protect the environment contrast starkly with Detrex's behavior. After discovering that Detrex had spilled TCE on Elkhart Products' property for many years, in 1986 Amcast and Elkhart Products asked Detrex to pay for the cleanup. *See Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1541 (N.D. Ind. 1991), *aff'd in part, and rev'd in part on other grounds, and remanded,* 2 F.3d 746 (7th Cir. 1993). From that notice to the present, Detrex stridently has refused to pay a single cent for the cleanup. While Amcast's and Elkhart Products' voluntary cleanup of environmental contamination was the exact conduct Congress intended CERCLA to foster, Detrex's recalcitrance is the very conduct that CERCLA seeks to remedy.[3]

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[3] H.R. Rep. No. 1016, 96th Cong., 1st Sess., pt. I, at 1, 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (CERCLA's purpose is "to provide for liability of persons responsible for releases of hazardous waste"; the purpose of CERCLA's strict liability provision is to provide "rapid recovery of the costs incurred . . . from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions"); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 59, 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2841, 2862 (amendments to CERCLA during reauthor-

In the district court, Amcast and Elkhart Products, at the close of discovery, initially moved for partial summary judgment on Detrex's liability under CERCLA, 42 U.S.C. § 9607(a)(1), as an owner and operator of a facility—namely, Detrex's tanker trucks—from which there was a release of a hazardous substance, TCE, into the environment which caused the incurrence of response costs necessary and consistent with the National Contingency Plan ("NCP"), 40 C.F.R. §§ 300.1-.68 (1988); 40 C.F.R. §§ 300.01-.920 (1991). R. 47. The district court, affirmed by the Seventh Circuit Court of Appeals, properly granted Amcast and Elkhart Products summary judgment as to Detrex's CERCLA liability as an owner and operator on the following undisputed material facts.

Elkhart Products used TCE to remove grease from its copper products. *Id.* at 59, 202-03, 217-18, 261-62. From 1978 until 1986, Detrex was Elkhart Products' sole supplier of TCE, making nineteen TCE deliveries, amounting to thousands of gallons, in tanker trucks owned and operated by Detrex. *Id.* at 59-60, 324-26, 323-35. When Detrex's trucks were unavailable to deliver TCE to Elkhart Products, Detrex arranged for transportation and delivery by an independent contract carrier, Transport Service Co. ("Transport Service"). *Id.* at 59 n.5, 323-35. Transport Service made fifteen TCE deliveries to Elkhart Products. *Id.* at 323-25, 367.

During deliveries, Detrex spilled or released pure TCE onto the ground at Elkhart Products' plant from the

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ization "should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups"; counterclaims should be managed carefully by courts "to insure that the litigation is conducted in an expeditious manner and is not unduly delayed"); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. V, at 2, 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3125, 3181 ("those responsible for creating . . . contamination, including those who generate, transport, treat, store, or dispose of hazardous wastes . . . are required to [pay for] . . . clean[up] costs"; "Voluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem.").

tanker trucks in three ways: (1) routinely spilling small quantities (two to five gallons) of TCE during delivery (the "delivery spills"); (2) overfilling a TCE storage tank, allowing 200 to 300 gallons of TCE to wash across the ground, destroying a large section of asphalt paving (the "overfill spill");[4] and (3) driving away from the TCE storage tank area without closing the delivery truck's valve, permitting a two-inch stream of TCE, totalling twenty-five to fifty gallons, to splash across the length of Elkhart Products' property (the "open-valve spill"). R. 60-73, 663.[5] As the Seventh Circuit aptly noted, "[t]here is evidence that both Detrex's and Transport Services' drivers sometimes spilled TCE accidentally on Elkhart's premises while trying to fill Elkhart's storage tanks and that some of this spillage found its way into the groundwater . . . ." *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993).[6] Detrex does not contest this finding.

Following partial summary judgment holding Detrex liable as an owner and operator under CERCLA, 42 U.S.C. § 9607(a)(1), Amcast and Elkhart Products filed

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[4] Respondents presented a wealth of testimony regarding the overfill incident, but they were unable to locate any eyewitnesses to that spill. Detrex successfully objected on hearsay grounds to Respondents' overfill spill evidence. The lower courts, therefore, did not consider the overfill spill in making their rulings. *See Amcast Indus. Corp.*, 779 F. Supp. at 1532.

[5] In addition to the undisputed proof that TCE spills occurred from Detrex's tanker trucks, uncontroverted evidence also showed that spills or releases of TCE caused Amcast and Elkhart Products to incur response costs that were necessary and consistent with the NCP. R. 122-23; *Amcast Indus. Corp.*, 779 F. Supp. at 1539.

[6] Detrex contested Respondents' entitlement to partial summary judgment on owner and operator liability on three grounds: (1) lack of NCP compliance; (2) unclean hands; (3) and no competent evidence of spills by Detrex. Significantly, Detrex never raised with the district court the issue of whether its tanker trucks were exempt from CERCLA's definition of a facility. *See Amcast Indus. Corp.*, 2 F.3d at 749.

a second summary judgment motion seeking, among other things, a determination that Detrex was jointly and severally liable for all of the response costs incurred in cleaning up the TCE contamination. R. 541. Detrex sought to avoid the imposition of joint and several liability under CERCLA by arguing that (1) none of Amcast's and Elkhart Products' response costs were attributable to Detrex's delivery spills, and (2) Amcast's and Elkhart Products' response costs could be apportioned based on the estimated volume of Detrex's TCE spills. *Id.* at 586-90.

In an effort to avoid the result of joint and several liability, Detrex argued, alternatively, that the district court should equitably apportion response costs even though neither Respondents nor Detrex had ever requested or pled contribution under 42 U.S.C. § 9613(f)(1). Detrex conceded that if its equitable apportionment argument were accepted, then CERCLA's strict joint and several liability scheme would be transformed, by judicial action, into a comparative fault analysis. *See* R. 594.

Shortly after filing its answer brief to Plaintiffs' second motion for partial summary judgment, Detrex sought leave to amend its answer for the purpose of filing a counterclaim. *Id.* at 632. For the first time, in a suit pending for over four and a half years, after years of discovery, the filing of serial summary judgment motions (one of which had been ruled upon) and a mere three months before trial, Detrex sought to assert contribution against Respondents under 42 U.S.C. § 9613(f)(1). Amcast and Elkhart Products opposed Detrex's motion to amend by showing, among other things, that Detrex's failure to file a contribution counterclaim earlier was not an excusable technical oversight as claimed by Detrex, but rather a deliberate litigation strategy that backfired. Detrex believed that asserting a contribution claim would be inconsistent with its strategy of denying any liability under CERCLA; when its initial strategy failed, Detrex scrambled, at a prejudicially late date, for a way to reduce its liability.

The district court, properly exercising its discretion, denied Detrex's motion to amend and, after a thorough analysis, imposed joint and several liability upon Detrex. *Amcast Indus. Corp. v. Detrex Corp.*, 822 F. Supp. 545, 553 (N.D. Ind. 1992), *aff'd in part, and rev'd in part on other grounds, and remanded*, 2 F.3d 746 (7th Cir. 1993). Hence, Amcast and Elkhart Products were awarded their response costs incurred in cleaning up the TCE contamination on Elkhart Products' property, as well as declaratory relief for future response costs.

As noted by the Seventh Circuit, Detrex proceeded to file a separate action against Amcast, Elkhart Products (and certain of its current or former employees and shareholders) and Transport Service seeking contribution under 42 U.S.C. § 9613(f)(1), for the response costs awarded to Amcast and Elkhart Products. *Amcast Indus. Corp.*, 2 F.3d at 748. Detrex's separate contribution suit is proceeding with discovery and is scheduled for trial in 1994. Detrex, therefore, has not been deprived of an apportionment of response costs—its contribution action goes forward. In the meantime, however, Amcast and Elkhart Products have yet to receive a single cent from Detrex towards the substantial expenses they began incurring in 1986 to clean up the environment. Amcast and Elkhart Products acted as responsible corporate citizens, voluntarily cleaning up environmental contamination at great expense, whereas Detrex, the commercial supplier and distributor of TCE that spilled TCE on Elkhart Products' property, disclaims any liability. If any unfairness exists in this action, the inequity has penalized Amcast and Elkhart Products, not Detrex.

In an effort to cloak Amcast and Elkhart Products in a veil of wrongdoing, Detrex's statement of the case inaccurately portrays the facts of record.[7] For instance,

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[7] Detrex accomplishes its inaccurate portrayal of the facts by, among other things, omitting any reference to the record before the Seventh Circuit.

Detrex refers to three companies besides Detrex that supplied solvent to Elkhart Products, insinuating that those other companies could be responsible for some of the TCE spillage. Petition, pp. 3-4. Detrex fails to mention, however, that there is no evidence in the record that these companies spilled TCE on Elkhart Products' property, whereas the record is replete with proof of Detrex's spills. Indeed, Detrex did not even name the other companies as defendants in Detrex's own contribution suit.

Further, Detrex's conclusory assertion that "Respondents are responsible for the vast majority of TCE and all of the TCA contamination at the manufacturing facility," *id.* at 4, simply has no factual foundation. Since Detrex never claimed a right to contribution under CERCLA, the courts below never addressed Respondents' responsibility for any contamination, and there is no reason to do so in this action, given Detrex's pending contribution suit. Detrex's hyperbolic claims also fail to mention that most of the incidents it references involved "stillbottoms" and not the pure, fluid TCE spilled by Detrex. R. 660-61. Stillbottoms are a thick, viscous mixture of oil with seven to fifteen percent TCE (as opposed to the 100% pure TCE spilled by Detrex). *Id.* Many of these incidents occurred inside Elkhart Products' plant and were properly cleaned up, preventing any environmental contamination. *Id.* This Court should not be swayed by Detrex's effort to paint Amcast and Elkhart Products as "reckless" polluters; Detrex's claims are factually unfounded and procedurally immaterial.

Detrex's exaggeration about spills by Elkhart Products mirrors Detrex's past denials that it ever spilled TCE on Elkhart Products' property. Both are without merit: Detrex finally now concedes that it spilled TCE on Elkhart Products' property. Petition, pp. 2, 4. In all prior proceedings, Detrex vehemently denied spilling TCE on Elkhart Products' property, despite uncontroverted proof to the contrary. *See* R. 383-84; Appellant's Amended Brief, p. 39. Notwithstanding Detrex's belated admission,

Detrex continues to resist CERCLA liability. The Seventh Circuit, however, correctly ruled on the issues that Detrex seeks to have reviewed. No valid grounds exist for this Court to grant Detrex's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Seventh Circuit fully considered and correctly resolved the first issue that Detrex asks this Court to review—whether CERCLA's definition of a "facility", 42 U.S.C. § 9601(9), encompasses Detrex's tanker-style delivery trucks from which TCE was spilled. CERCLA defines "facility" to mean "motor vehicle", *i.e.*, a truck. Detrex's argument that its tanker trucks, or the TCE it spilled, constitute "a consumer product in consumer use or in a vessel", Petition, p. 12, and as such are exempt from CERCLA's definition of a facility, is without merit. Detrex's argument ignores the plain meaning of the statute and would read the term "motor vehicle" out of CERCLA's definition of a facility. If accepted, Detrex's interpretation of the consumer product exemption would defeat Congressional intent behind CERCLA—holding those who spill responsible for the cost of cleanup. As the Seventh Circuit noted in regard to the consumer product exception, the proper "literal interpretation that furthers the statute's purpose is hard to beat." *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993).

The cases upon which Detrex relies to show a split of authority among circuits on this issue are factually and legally distinguishable from the case at bar. None of the cases upon which Detrex relies involved motor vehicles specifically defined under CERCLA as facilities; none of Detrex's case law involves active participation by a defendant in hazardous substance spills. Insofar as the cases relied upon by Detrex apply to the present case, they are consistent with the result reached by the Seventh Circuit. Indeed, the Seventh Circuit referred approvingly (2 F.3d at 750) to the result reached in *Dayton Indep. School*

Dist. v. United States Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990), the main authority upon which Detrex relies.

The consumer product exception has no application to this case. Neither the tanker trucks nor the spilled TCE plausibly can be viewed as consumer products as to Amcast and Elkhart Products and neither item—the truck or the spilled TCE—was in consumer use. Lacking merit, the question raised by Detrex is not an important issue of federal law. Even if the issue raised was significant, it should be addressed in Congress' upcoming 1994 reauthorization review of CERCLA, rather than by this tribunal.

Similarly, the second question Detrex raises for possible review—whether Detrex should receive an equitable apportionment of response costs in this 42 U.S.C. § 9607(a) action, despite the absence of any CERCLA contribution claim under 42 U.S.C. § 9613(f)(1)—does not merit the invocation of this Court's discretionary jurisdiction for several reasons. First, Detrex's apportionment argument is moot. As the Seventh Circuit noted, Detrex has brought a separate action against Amcast, Elkhart Products, Transport Service and certain of Elkhart Products' current and former employees or shareholders. Thus, the relief that Detrex seeks, an apportionment of response costs, is underway, and this Court should not unnecessarily address the apportionment issue sought to be raised by Detrex.

Second, Detrex's argument that an apportionment of damages should occur in a § 9607(a) action, absent a contribution counterclaim under § 9613(f)(1), was properly rejected by the district court and the Seventh Circuit. Detrex's argument would render § 9613(f)(1) (which creates a private cause of action for contribution in CERCLA cases) meaningless surplusage—a result at odds with Congressional intent and well-established rules of statutory construction. Moreover, the case law upon which Detrex relies is factually and legally distinguishable from

the case at bar. No split of authority exists and, since the issue raised lacks merit, no significant issues of federal law warrant the exercise of this Court's jurisdiction.

Finally, the result reached by the Seventh Circuit—about which Detrex complains—was fair. Detrex, as part of its litigation strategy, chose not to assert a contribution claim in this action, believing that it could escape CERCLA liability. Detrex's litigation strategy backfired; it now complains about a supposed unfairness that it engineered. Detrex's entreaties to equity and fairness, therefore, ring hollow. Detrex's arguments should be addressed, if at all, by Congress and not this Court. Detrex's petition should be denied.

ARGUMENT

I. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE CONSUMER PRODUCT EXCEPTION TO CERCLA'S DEFINITION OF A FACILITY DOES NOT MERIT THIS COURT'S REVIEW.

A. The Seventh Circuit Correctly Interpreted the Consumer Product Exception to CERCLA's Definition of a Facility

Congress enacted CERCLA, a remedial statute entitled to broad construction furthering its purpose, to encourage the cleanup of environmental contamination and place the financial burden of cleanups upon those who spill hazardous pollutants into the environment. *B.F. Goodrich Co. v. Murtha,* 958 F.2d 1192, 1198 (2d Cir. 1992) ("Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup."); *General Elec. Co. v. Litton Indus. Automation Sys., Inc.,* 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied,* 499 U.S. 937, 111 S. Ct. 1390 (1991) ("The purpose of allowing

a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites.")[8]

CERCLA, 42 U.S.C. § 9607(a), imposes strict liability if the following elements are met: (1) defendant fits one of the four classes of responsible parties outlined in § 9607(a); (2) there is a release or a threatened release of a hazardous substance from a facility into the environment; (3) plaintiff incurred costs responding to the release or threatened release; and (4) the costs and response actions conform to the NCP. *B.F. Goodrich Co.*, 958 F.2d at 1198; *Environmental Transp. Sys., Inc. v. Ensco, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992). Where the environmental harm is indivisible and lacks reasonable basis for apportionment, CERCLA liability is joint and several. *B.F. Goodrich Co.*, 958 F.2d at 1198; *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057, 110 S. Ct. 1527 (1990); *United States v. Monsanto Co.*, 858 F.2d 160, 171 n.23 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156 (1989).

Responsible parties under CERCLA include an owner and operator of a facility. 42 U.S.C. § 9607(a)(1). CERCLA defines facility to mean a "motor vehicle", *i.e.*, a truck:

> "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, *motor vehicle*, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9) (emphasis added).

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[8] *Accord*: *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 14, 100 S. Ct. 883, 891 (1980) (safety legislation); *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S. Ct. 1920, 1923 (1980) (civil rights legislation).

Detrex argued to the Seventh Circuit that the district court erred in holding Detrex liable as an owner or operator of a facility, contending that its tanker trucks, or the TCE they delivered, constituted a "consumer product in consumer use" exempt from CERCLA's definition of a facility. Appellant's Amended Brief, pp. 28-32.[9] The Seventh Circuit properly rejected Detrex's argument because Detrex's argument collapses the hazardous substance it spilled, TCE, into an exemption meant for containers from which such substances might escape or be released into the environment. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993).[10]

CERCLA expressly includes "motor vehicle" in the definition of a facility. Hence, the statute's plain meaning encompasses Detrex's delivery trucks. *Reading Co. v. Philadelphia*, 823 F. Supp. 1218, 1232 (E.D. Pa. 1993) ("Since the definition of facility specifically mentions [motor vehicles], there must be a strong presumption in favor of the conclusion that [motor vehicles] are not consumer products in consumer use."). When a statute is unambiguous, its plain meaning should be applied.

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[9] The Seventh Circuit considered this ground for appeal although it was not raised with the district court. "But Detrex tacitly conceded in the district court that it was, though not an arranger for disposal, an owner of a facility, within the meaning of the statute. Detrex thus conceded a ground that it now seeks to raise with us, that it was not an owner of a facility." *Amcast Indus. Corp.*, 2 F.3d at 749. Detrex's petition should be denied on the ground that it waived its consumer product argument by not presenting it to the district court. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

[10] *Accord*: *National R.R. Passenger Corp. v. New York City Housing Auth.*, 819 F. Supp. 1271, 1276 (S.D.N.Y. 1993) ("Thus, the proper approach is to construe the 'consumer product in consumer use' exclusion from the broad definition of 'facility' to mean the term does not encompass consumer products in consumer use which are, in effect, containers of hazardous substances, such as transformers which contain PCB's.").

Estate of Cowart v. Nichlos Drilling Co., —— U.S. ——, 112 S. Ct. 2589, 2594 (1992) ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary [cases] is finished."). The Seventh Circuit knows a truck when it sees one, and a truck is a facility under CERCLA.

Under its plain meaning, then, the "consumer product in consumer use" exception is inapplicable to Detrex's delivery trucks. Detrex's tanker trucks were not "consumer products" as between Detrex and Elkhart Products. Detrex was not in the business of selling trucks and likewise, Elkhart Products was not a consumer of tanker trucks from Detrex or anyone else. The first prong of the exception, "consumer products", thus has no application here. Similarly, Detrex never placed its trucks in Elkhart Products' control, eliminating the second prong of the exception, "in consumer use". The Seventh Circuit, therefore, correctly rejected Detrex's argument that its tanker trucks, from which TCE was spilled onto Elkhart Products' property, are exempt from CERCLA's definition of a facility. *Amcast Indus. Corp.*, 2 F.3d at 750.

Detrex argues, nonetheless, that the TCE it delivered to Elkhart Products falls within the consumer product exception. Detrex's argument that the consumer product exception refers to facilities that contain consumer products, and not simply facilities that are consumer products, contains three separate fatal flaws. First, Detrex's argument fails because it addresses only the pure TCE in Detrex's tanker, ignoring the TCE that spilled on the ground. Had Detrex safely delivered TCE to Elkhart Products' storage tanks without spillage, then this would be a different case. Detrex, however, spilled TCE from its trucks onto Elkhart Products' property. Spilled TCE cannot plausibly be deemed a consumer product.[11] Elk-

[11] *National R.R. Passenger Corp.*, 819 F. Supp. at 1276 ("In this case, the support pillars and the undersides of the buildings were

hart Products did not order waste TCE from Detrex, nor did Elkhart Products have any use for a batch of soil and groundwater pollution. When Detrex spilled TCE onto Elkhart Products' soil, the consumer product exception, but not the TCE, evaporated.[12] Similarly, the spilled TCE was never put to "consumer use"; Elkhart Products could not use TCE that seeped into the groundwater and soil. In short, the consumer product exception has no application to the many gallons of TCE that Detrex spilled.[13]

Second, Detrex's interpretation of the consumer product exception, if accepted, would turn other sections of

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themselves coated with ACM [a hazardous substance]. The ACM was not, for instance, contained in drums waiting to be put to a consumer use, in which case the drums would not be facilities. Therefore, the consumer products exception does not apply.").

[12] Detrex cannot legitimately sever its CERCLA liability by asserting that, once the TCE spilled, Detrex was no longer the owner or operator of the property where the TCE was spilled. If the TCE were the facility, as claimed by Detrex, then Detrex would remain a responsible party under CERCLA for the spilled TCE (which is not a consumer product when spilled) as a past owner or operator of a facility, 42 U.S.C. § 9607(a)(2).

[13] Detrex's petition cites to a host of exceptions contained in CERCLA (none of which apply to this suit), such as the exclusion for petroleum, 42 U.S.C. § 9601(14). Petition, pp. 8-9. These clear exceptions to CERCLA's scope show that, if Congress had intended to exempt spills of pure hazardous substances from CERCLA's operation, it could have, and would have, done so. Additional exceptions to CERCLA's scope should not be grafted onto the statutory framework through judicial decision. *Negonsott v. Samuels*, —— U.S. ——, 113 S. Ct. 1119, 1122-23 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S. Ct. 3245, 3250 (1982)) (" 'Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.' "); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

CERCLA into nonsensical babble. For instance, 42 U.S.C. § 9607(a) refers to "the owner and operator of a vessel or a facility", "any facility at which such hazardous substances were disposed of", "disposal or treatment of hazardous susbtances . . . at any facility", and "transport to disposal or treatment facilities". Each of these references make sense when the consumer product exception is interpreted literally to mean facilities that are consumer products, such as containers. Reading the exception to mean consumer products contained in facilities, however, renders § 9607(a)'s statutory language meaningless. One can operate a truck or a container, but how does one operate TCE? Who would qualify as a past owner or operator of "any [TCE] at which such hazardous substances were disposed of?" Detrex's interpretation of the consumer product exception, which renders CERCLA's key liability provision a tangled web of nonsense and doublespeak, was properly rejected by the Seventh Circuit. *United States v. Nordic Village Inc.*, —— U.S. ——, 112 S. Ct. 1011, 1015 (1992) (it is a well "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."); *Crandon v. United States*, —— U.S. ——, 110 S. Ct. 997, 1001 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the . . . statute as a whole and to its object and policy.").

Detrex's argument that the Seventh Circuit ignored the "any vessel" language of the exception is without merit for two reasons. First, CERCLA defines "vessel" to mean "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 42 U.S.C. § 9601(28). Trucks are not boats. Second, Detrex admitted to the Seventh Circuit that its trucks were not vessels: "it is clear that the Detrex trucks were not vessels as defined in § 9601(28) at the time of the alleged spill." Appellant's Amended

Brief, p. 26. Hence, Detrex cannot now legitimately argue, factually or legally, that its trucks constitute vessels.[14]

Detrex's interpretation of the "consumer product" exception subverts Congressional intent behind CERCLA. Congress intended CERCLA to force those responsible for spilling hazardous substances to bear the financial responsibility of cleanup. H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038 (CERCLA's goal is "to hold responsible parties liable for the costs of these clean-ups"; a "responsible party may be held liable for the entire cost of clean-up, even if that party's contribution to the waste site was minimal."). Detrex's interpretation of the consumer product exception would decimate CERCLA's purpose by creating a wholesale exception for spills by manufacturers and distributors of hazardous substances. Congress did not intend such a result; to the contrary, Congress specifically included producers and transporters of hazardous substances within CERCLA's scope. *See* 42 U.S.C. § 9608(b)(1). Indeed, the governmental Superfund created under CERCLA is funded by taxing chemical manufacturers. 42 U.S.C. § 9611; 26 U.S.C. §§ 4661, 9507.

Acceptance of Detrex's strained interpretation of the consumer product exception would also lead to absurd results. Take, for example, a distributor's truck hauling poly-chlorinated biphenols ("PCBs"), a hazardous substance under CERCLA. Under Detrex's argument, if a truck was hauling newly-manufactured PCBs, the distributor could spill, splash and spew PCBs across public roadways and private property without risk of paying for the

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[14] Detrex's argument, moreover, would wreak havoc in CERCLA's main liability section, contrary to settled principles of statutory construction. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

needed cleanup of environmental damage. Once the PCB fluid was used, however, the truck carrying waste PCBs would be strictly liable under CERCLA for the slightest drip. CERCLA does not create this strange dichotomy advocated by Detrex, and it should not be grafted onto the statutory language under the guise of the consumer product exception.

The Seventh Circuit gave careful analysis to Detrex's arguments and correctly found them without merit. Since the Seventh Circuit correctly resolved this issue in favor of Amcast and Elkhart Products, an exercise of this Court's discretionary jurisdiction to review that issue is unnecessary. No important question of federal law is presented for this Court's review and resolution given the Seventh Circuit's correct ruling and the lack of merit in Detrex's argument. Moreover, Detrex is not asking merely for review of an issue of statutory construction; Detrex is asking this Court to rewrite CERCLA and revise its policy underpinnings, a task best left to Congress in its upcoming 1994 reauthorization review of CERCLA.[15] Detrex's petition for a writ of certiorari should be denied.

B. The Cases Upon Which Detrex Relies to Assert a Split of Authorities Among the Lower Courts Interpreting the Consumer Product Exception are Factually and Legally Distinguishable from the Case at Bar

Detrex's main argument is that the Seventh Circuit's decision conflicts with *Dayton Indep. School Dist. v. United States Mineral Prods. Co.*, 906 F.2d 1059 (5th Cir. 1990). *Dayton Indep. School Dist.*, however, is factually and legally distinguishable from the case at bar. Insofar as *Dayton Indep. School Dist.* is analogous to the present case, the Fifth Circuit's reasoning and holding are entirely consistent with the Seventh Circuit's decision

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[15] *See Braxton v. United States*, —— U.S. ——, 111 S. Ct. 1854, 1858 (1991).

and the Seventh Circuit so held. *Amcast Indus. Corp.*, 2 F.3d at 750.

Dayton Indep. School Dist. involved claims by various school districts and others against asbestos manufacturers and suppliers to recover the costs of removing asbestos-containing ceiling and fire-proofing products from various buildings. The asbestos manufacturers moved to dismiss plaintiffs' claim under 42 U.S.C. § 9607(a)(3) for failure to state a claim upon which relief could be granted. Plaintiffs countered that the defendants were liable under CERCLA for disposing of a hazardous substance, asbestos, "by placing it in the building materials installed in their building." 906 F.2d at 1064. The Fifth Circuit rejected plaintiffs' argument reasoning that CERCLA's definition of "disposal" did not "encompass the commercial sale of asbestos-containing useful building products by the defendant manufacturers and suppliers." *Id.* at 1065.

The Fifth Circuit additionally analyzed whether a disposal of asbestos "at a facility" had occurred. *Id.* Applying the consumer product exception, the Fifth Circuit held that "[s]ince the building materials are without a doubt consumer products, they [the defendants] cannot be held liable for disposing of asbestos 'at a facility'." *Id.* The Fifth Circuit rejected plaintiffs' argument that the facilities at issue were "the buildings in which the asbestos-containing materials were installed, and not the materials themselves." *Id.*

Dayton Indep. School Dist. is legally distinguishable from the case at hand because, under a variety of rationales, asbestos removal has been held beyond CERCLA's scope. *3550 Stevens Creek Assoc. v. Barclay's Bank of California*, 915 F.2d 1355, 1362-65 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2014 (1991); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070, 110 S. Ct. 1113 (1990); *Reading Co.*,

823 F. Supp. at 1234. More importantly, *Dayton Indep. School Dist.* is factually distinguishable from this action because, not only was no truck involved, but also the asbestos manufacturers and suppliers did not release asbestos contamination into the environment. Detrex, on the other hand, actively caused TCE contamination on Elkhart Products' property. Detrex's active releases distinguish this case from the asbestos manufacturers' and suppliers' passive involvement in the claimed release.

The Fifth Circuit's decision, insofar as it is analogous to the case at bar, is consistent with the Seventh Circuit's reasoning and holding. Indeed, the Seventh Circuit expressly approved of the Fifth Circuit's holding and used the Fifth Circuit's reasoning to guide its own analysis. In *Dayton Indep. School Dist.*, the exempted materials were building products—facilities that are consumer products. The Fifth Circuit ruled that plaintiffs failed to state a claim, not merely because the building products contained asbestos, a useful consumer product, but also because the building products themselves were consumer products. This result is consistent with the Seventh Circuit's holding that "[t]he exception is for facilities that *are* consumer products in consumer use, not for consumer products contained in facilities." *Amcast Indus. Corp.*, 2 F.3d at 750.

The other decisions upon which Detrex relies are likewise unavailing. *Vernon Village, Inc. v. Gottier,* 755 F. Supp. 1142 (D. Conn. 1990) exempted drinking water containing hazardous substances from CERCLA's definition of a facility under the consumer product exception. In doing so, the court relied heavily on the defendant's innocence in causing the contamination: "[t]hey have in no way caused or contributed to the release of the hazardous substances into the drinking water supply." *Id.* at 1151. Detrex, in contrast, actively polluted Elkhart Products' property. *Vernon Village*'s CERCLA analysis has never been cited by another court. Detrex's contention that *Vernon Village* creates a split of authority lacks

credence when other courts have ignored its analysis and holding.

Detrex's reliance on *Electric Power Bd. v. Westinghouse Elec. Corp.*, 716 F. Supp. 1069 (E.D. Tenn. 1988) is similarly misplaced. *Electric Power* was a state law product liability suit, and the court addressed CERCLA, with little analysis, to determine whether federal law preempted a state law statute of repose for the action. Unlike the case at bar, the defendants in *Electric Power* had no involvement in the release of hazardous substances. Moreover, *Electric Power* has not created any confusion among lower courts as to the consumer product exception —only *Vernon Village* has ever favorably cited to *Electric Power*'s analysis.

In contrast to the cases upon which Detrex relies, which applied the consumer product exception with scant analysis and discussion, more recent and better reasoned decisions conclude, after thoroughly reviewing the exception's legislative history, that the exception applies to facilities that are consumer products. The court in *Reading Co.*, 823 F. Supp. at 1232-35, extensively reviewed the legislative history behind the consumer product exception and rejected the argument that Detrex makes. *Reading* held that "CERCLA's legislative history indicates that the consumer products exception was meant to cover individual consumers", such as those who might purchase a can of drain cleaner in a retail store. *Id.* at 1233. *Reading* further noted that Detrex's argument, "[t]aken to its logical conclusion, . . . becomes absurd." *Id.* at 1235. "Under this rationale, things defined as facilities by CERCLA, such as buildings, *motor vehicles,* and aircraft would be transformed into consumer products in consumer use, simply by virtue of the fact that people use them." *Id.* (emphasis added). *Reading* rejected this result as it would effectively nullify private actions under CERCLA. *Id. Accord: CP Holdings, Inc. v. Goldberg-Zoino & Assoc.*, 769 F. Supp. 432, 439 (D.N.H. 1991) (rejecting inter-

pretation of consumer product exception that would exclude CERCLA actions against landowners "despite the fact that section 9607 clearly provides for such actions.").

Simply put, no split of authority warranting this Court's review exists in the lower courts. No cases have addressed the consumer product exception under facts like those at bar. The cases upon which Detrex relies are factually or legally dissimilar to this action. Even if analogous to the facts at hand, the main authority upon which Detrex relies, *Dayton Indep. School Dist.*, reached a result consistent with the Seventh Circuit's conclusion. This Court should deny Detrex's petition.

II. THE SEVENTH CIRCUIT'S PROPER RULING ON THE ISSUE OF EQUITABLE APPORTIONMENT DOES NOT MERIT THIS COURT'S REVIEW

A. Detrex's Separate Contribution Action Makes it Unnecessary for this Court to Address Whether Response Costs Should be Apportioned Under CERCLA Absent a Contribution Claim

This Court need not determine whether Detrex is entitled to an equitable apportionment of response costs in this action absent a contribution claim under 42 U.S.C. § 9613(f)(1), because Detrex has filed a § 9613 suit against Amcast, Elkhart Products, certain of Elkhart Products' current and former employees or shareholders, and Transport Service. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) ("Eventually Detrex filed a separate action for contribution from Elkhart; that suit is pending in the district court."). Detrex's contribution suit, slated for trial in 1994, seeks an equitable apportionment of the response costs for which Detrex was held liable in this proceeding. This Court should decline Detrex's invitation to review an issue on which Detrex will receive, in the near future, the full and complete relief it requests in this action—an equitable apportionment of response costs. The judicial resources of this

Court would be wasted addressing an issue that Detrex has, for all intents and purposes, rendered moot. *DeFunis v. Odegarrd*, 416 U.S. 312, 317, 94 S. Ct. 1704, 1706 (1974) ("A determination . . . of the legal issues tendered by the parties is no longer necessary to compel [the remedy requested.]"). *Accord*: 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533 (1984) ("Courts do not wish to make law, nor to waste their limited resources, simply to satisfy curiosity or a naked desire for vindication.").

No unfair prejudice results from deferring an equitable apportionment of response costs to Detrex's separately-pending contribution action. As the Seventh Circuit correctly noted, Detrex could have timely asserted a counterclaim for contribution in this action, but it did not do so. *Amcast Indus. Corp.*, 2 F.3d at 748. *Accord*: 42 U.S.C. § 9613(f)(1). Such a counterclaim would have been corollary to Detrex's claimed defenses of unclean hands and contributory negligence.

Detrex's litigation strategy in the district court, however, disclaimed any CERCLA liability. Detrex did not assert a contribution counterclaim so as to prevent inconsistency with its denial of any liability. When Detrex's strategy gamble backfired, Detrex unsuccessfully sought to assert a contribution counterclaim, raising the issue for the first time in a suit pending for four and a half years, after years of discovery, serial summary judgment motions (one of which was ruled upon), the close of discovery, and within three months of the scheduled trial date. The district court properly exercised its discretion in denying Detrex's prejudicially tardy effort to introduce contribution into this suit, as § 9613 was available to Detrex in a separate action.[16]

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[16] Indeed, Detrex does not raise denial of its belated motion to assert a contribution counterclaim as an issue for this Court's possible review and Detrex, therefore, has waived that argument. *Youakim*, 425 U.S. at 234, 96 S. Ct. at 1401.

The district court and the Seventh Circuit did not rule that Detrex could not receive an equitable apportionment. Rather, the courts below merely required that an equitable contribution claim be timely pled, else be pursued in a subsequent action. Such a requirement is hardly the extraordinary and technical procedural pitfall that Detrex attempts to portray. Rather than creating a hyper-technical conundrum, the district court and the Seventh Circuit sought, within CERCLA's framework, minimal compliance with the fair standards of notice pleading to achieve justice—goals that every federal court would pursue and accomplish by reaching the same result.[17] Detrex's petition for a writ of certiorari to the Seventh Circuit should be denied.

B. The Seventh Circuit Correctly Determined that an Equitable Apportionment of Response Costs Should Not Occur in this Action Absent a CERCLA Contribution Claim

The Seventh Circuit correctly rejected Detrex's argument that the district court was required to apportion response costs in this action, absent a § 9613(f)(1) contribution claim:

> *"The argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense, so we dispatch it at the outset.* The statute is clear that whoever (like Elkhart) incurs

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[17] Detrex cannot credibly complain about being subject to the district court's judgment until response costs are apportioned, a likely delay of less than a year, when Amcast and Elkhart Products have been out of pocket over a million dollars for over seven years due to Detrex's recalcitrance. The possible brief delay between enforceability of the district court's judgment and an apportionment of response costs is not a windfall to Amcast and Elkhart Products. Assuming, *arguendo*, that the delay did occasion a windfall to Respondents, CERCLA contemplates such a temporary advantage to provide an incentive for voluntary cleanups. *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D.N.J. 1991).

> costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as Detrex does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct." *Amcast Indus. Corp.*, 2 F.3d at 748 (emphasis added).

Detrex's argument that §§ 9607(a) and 9613(f)(1) do not require separately-pled claims is contrary to the statute's plain language, well-settled rules of statutory construction, congressional intent, and the great weight of authority.

CERCLA creates a cause of action for contribution:

> "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title." 42 U.S.C. § 9613(f)(1).

The codification of the right to contribution apart from § 9607(a) suggests that contribution is not an automatic incident of a cost recovery action, but that it is a separate claim. Section 9613(f)(1) is replete with references to contribution requiring an affirmative claim, rather than being an automatic component of a § 9607(a) claim. Detrex's argument ignores the statute's direct mandate

that "[i]n resolving contribution claims" the court may equitably allocate response costs. This language means that in non-contribution cases, such as the case at bar, equitable allocation is not permissible. *Russello v. United States,* 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "). Under Detrex's argument, § 9613 is entirely surplusage, a proposition presumptively invalid under settled statutory construction rules. Given the statute's plain language and import, the Seventh Circuit aptly described Detrex's argument as making "no sense". *Amcast Indus. Corp.,* 2 F.3d at 748.[18]

Contrary to Detrex's representation that the Seventh Circuit stands alone in reserving the allocation of response

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[18] On the basis of Congressional intent and CERCLA's statutory structure, *United States v. Kramer,* 757 F. Supp. 397, 416-17 (D.N.J. 1991) soundly rejected the same argument that Detrex seeks to raise with this Court:

> *"Collapsing the distinction between section 107 and section 113 ignores the clear language and structure of the statute . . . . Congress enacted section 113 as a separate section to address contribution.*
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> * * * *
>
> "[T]he structure of CERCLA does not preclude consideration of equitable factors, including the liability of a PRP who was (or is) [a] plaintiff in a section 107 action. *Rather, CERCLA separates those equitable factors from section 107 and considers them in a section 113 contribution action.*" (Emphasis added.)

In this case, where no contribution claim was pled, the Seventh Circuit properly rejected "apportioning clean-up costs in a section 107 action (absent proof that the harm is divisible); CERCLA clearly provides that such apportionment is to be accomplished through a section 113 contribution action." *Id.* at 417. *Accord: United States v. Stringfellow,* 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

costs to contribution suits, numerous circuit and district courts maintain the distinction between CERCLA's liability and contribution provisions—a division that Detrex seeks to collapse. *O'Neil v. Picollo,* 682 F. Supp. 706, 725-26 (D.R.I. 1988) ("[I]ssues of fairness and equitable apportionment may be more properly addressed in a subsequent contribution action . . . ."), *aff'd,* 883 F.2d 176, 183 (1st Cir. 1989) ("Appellants should now move on to their contribution action where their burden will be reduced and the district court will be free to allocate responsibility according to any combination of equitable factors it deems appropriate."), *cert. denied,* 493 U.S. 1071, 110 S. Ct. 115 (1990); *United States v. South Carolina Recycling and Disposal, Inc.,* 653 F. Supp. 984, 995 n.8 (D.S.C. 1986), *aff'd in part, vacated in part on other grounds sub nom. United States v. Monsanto Co.,* 858 F.2d 160 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106, 109 S. Ct. 3156 (1989).[19]

Since the Seventh Circuit correctly resolved the issue sought to be raised, this Court should not undertake an additional review of Detrex's argument. No important question of federal law is presented for this Court's re-

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[19] Detrex's argument does not simply run counter to precedent, it would work a drastic re-write of CERCLA liability. The scope of CERCLA liability is determined under common law principles of joint and several liability. *United States v. Chem-Dyne Corp.,* 572 F. Supp. 802, 810-11 (S.D. Ohio 1983). In enacting the Superfund Amendments and Reauthorization Act of 1986, Congress expressly endorsed a common law joint and several liability approach to CERCLA. *United States v. R.W. Meyer, Inc.,* 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied,* 494 U.S. 1057, 110 S. Ct. 1527 (1990); *United States v. Monsanto Co.,* 858 F.2d 160, 171 n.23 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106, 109 S. Ct. 3156 (1989). Detrex's interpretation of the statutory scheme, however, renders CERCLA liability several—not joint and several—because contribution liability is necessarily several. *United States v. Conservation Chem. Co.,* 619 F. Supp. 162, 229 (W.D. Mo. 1985). Such a drastic change in the scope and nature of CERCLA's liability is best addressed by Congress, not this Court.

view, given the absence of merit in Detrex's contentions. Moreover, any review of CERCLA at this time is unnecessary, since Congress will reexamine CERCLA's framework in 1994. Detrex's petition should be denied.

C. The Cases Upon Which Detrex Relies to Assert a Split of Authorities Among Lower Courts in Regard to Equitable Apportionment are Factually and Legally Distinguishable from the Case at Bar

The cases upon which Detrex relies are distinguishable from the case at bar because they expressly involved § 9613 claims or counterclaims. The district court correctly discounted the weight of Detrex's authorities given this crucial legal and factual distinction:

> "Many of the cases upon which Detrex relies analyzed contribution claims under § 9613, e.g., *Amoco Oil v. Borden, Inc.*, 889 F.2d [664, 672 (5th Cir. 1989)]; *Shapiro v. Alexanderson*, 741 F. Supp. [472, 479 n.5 (S.D.N.Y. 1990)]. In *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), the Court applied § 9613 to apportion liability in a § 9607 action, but relied in part on the fact that the party seeking response costs had admitted CERCLA liability. Amcast has made no such admission. Further, the *Dant & Russell* court apportioned liability within the context of a proof of claim in a bankruptcy case."

Amcast Indus. Corp., 822 F. Supp. 545, 553 (N.D. Ind. 1992), *aff'd in part, rev'd in part on other grounds, and remanded*, 2 F.3d 746 (7th Cir. 1993).[20]

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[20] Similarly, *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1426-27 (D. Md. 1991) relied upon § 9613 for its reasoning and is, therefore, inapposite because no § 9613 claim is at issue in the case at bar. *United States v. Asarco, Inc.*, 814 F. Supp. 951, 956 n.3 (D. Colo. 1993) not only specifically relied on the presence of a § 9613 claim, it also noted that *Amoco Oil Co.* and *Dant & Russell* "are of limited persuasive value because the courts did not consider whether there is a distinction . . . between contribution claims and cost recovery claims."

Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1141 (D.R.I. 1992) is inapposite to this action as the court's holding expressly exempted § 9607(a) actions to recover response costs voluntarily incurred, as opposed to a wholly derivative action seeking to limit the plaintiff's exposure to another PRP. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508 (10th Cir. 1991) (per curiam) involved whether a party seeking contribution under § 9613 must establish the requisite liability elements of § 9607(a). The Tenth Circuit, in holding that § 9613 creates a contribution claim resting on an underlying CERLCA liability created by § 9607, provided no support for Detrex's equitable apportionment argument.

Simply put, Detrex has no cases on point supporting its argument that, despite no pending contribution claim, CERCLA nonetheless permits an equitable apportionment of response costs. Specifically, none of the cases upon which Detrex relies involve a voluntary private party cleanup where no § 9613 has been pled. As the cases cited by Detrex are inapposite, Detrex's petition should be denied.

CONCLUSION

No good reasons exist for this Court to review the Seventh Circuit's proper resolution of the issues proposed by Detrex. Detrex's petition for a writ of certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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